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See dissenting opinion.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of C.M., A Minor.	
A.F. et al., Plaintiffs and Appellants, v. J.M., Defendant and Respondent.	E067084 (Super.Ct.No. RIA1600006) OPINION

APPEAL from the Superior Court of Riverside County. Eric V. Isaac, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded with directions.

Leslie A. Barry, by appointment of the Court of Appeal, for Plaintiffs and Appellants.

Valerie N. Lankford, by appointment of the Court of Appeal, for Defendant and Respondent.

J.M. (father) and M.F. (mother) broke up when their son C.M. (child) was 10 months old. The mother started dating another man, A.F. (stepfather), and eventually married him.

According to the mother, she encouraged the father to visit the child. Nevertheless, over a year and a half, there were only three visits – one in which the father merely said "Hi," one at the insistence of the mother while she went to a grocery store, and one in which the father said that he "just couldn't be a parent right now." When the mother asked him, however, to consent to allow the stepfather to adopt the child, he became "irate" and "threatened to take her to court." He followed through on this threat by filing a paternity petition.

The mother and the stepfather (parents) then filed the present proceeding to free the child from the father's custody and control based on abandonment. The mother testified at trial; the father did not. The trial court ruled that, because the father had sought custody and visitation by filing the paternity proceeding, and because he had stated in the paternity proceeding that the mother was keeping the child away from him, it could not find that he had the intent to abandon the child.

The parents appeal. They contend that the trial court erred by ruling that it could consider only abandonment during the one year prior to the filing of the petition. They further contend that it erred by ruling that the parents had to prove both a failure to communicate and a failure to support. However, while these issues were discussed at trial, the trial court never actually made any such rulings.

The parents also contend that the trial court erred by finding that the father lacked the intent to abandon. As to this, we agree. Once the parents showed that the father failed to communicate with the child for at least one year, the burden shifted to the father to produce evidence that, during the relevant statutory period, he lacked the intent to abandon. Filing a paternity petition after that period had already run was insufficient to do so. His statement in a declaration in support of that paternity petition that "[*a*]*t present*, the [mother] keeps our son away from me" (italics added) was also insufficient. Hence, we will reverse.

I

FACTUAL BACKGROUND

The evidence before the trial court consisted of the probation officer's reports (admissible under Family Code, section 7851, subdivision (d)), the mother's oral testimony, and four exhibits introduced by the father. We limit our consideration to this evidence,[1] which showed the following.

In April 2012, the mother and the father started dating. In November 2012, they moved in together.

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[1] The parents cite several additional exhibits. However, it does not appear that these were ever offered or admitted into evidence. Accordingly, we do not consider them.

The father cites his objection to the adoption petition, even though it was unsworn and was signed only by his counsel. "'[I]t is axiomatic that statements by counsel are not evidence . . . .' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 815, fn. 10.)

In January 2013, the mother discovered that she was pregnant. When she told the father, he accused her of trying to "trap" him. He demanded that she have an abortion. In July 2013, still pregnant, she moved out and went to live with her parents.

The child was born in September 2013. The father was not at the hospital at the time, although he did visit the next day.

During the child's first year of life, the father moved in and out of the mother's home "a number of times." In July 2014, they broke up for good when the father left the mother and the child "in the middle of a gas station." Around the same time, the mother started dating the stepfather. The stepfather was acquainted with the father; at some point, the father indicated to him that "he did not care about the child or [the mother]."

The mother testified that, between July 2014 and the time of trial, the father saw the child only three times.

First, in September 2014, the mother dropped off some clothing to the father. The child was in the back seat. She rolled down the window and asked, "Do you want to say hi?" The father said, "Hi," then said, "I'll see you later."

Second, in October 2014, hoping to encourage visitation, she dropped off the child with the father and the father's mother while she went to a nearby grocery store.

On January 18, 2015, the father visited the mother and the child for about an hour. He brought peanut M&M's for the child, even though they were inappropriate for a one-year-old baby. He was "coming down" from drugs and alcohol that he had consumed the

night before. He said he "just couldn't be a parent right now," and he asked the mother to forgive him.

A few days later, the father asked if he could continue to see the child. The mother said "that was fine as long as he came over sober . . . ." He responded that he only wanted to drink on weekends and he felt that was okay.

According to the mother, the father never asked to see the child again. She kept calling him, "begging him to be in [the child's] life, and there was no response."[2]

Around January 2015, the father made two child support payments voluntarily. In April 2015, the mother obtained an order requiring him to pay child support through the Department of Child Support Services.

In February 2015, the mother moved in with the stepfather. In August 2015, she asked the father to consent to allow the stepfather to adopt the child. He "became irate, used profanity, and threatened to take her to court."

In September 2015, the mother asked the father to stop paying child support because "he was not involved in the child's life and she no longer needed or wanted his

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[2] The mother testified that she gave the father her old car so he would have transportation for visits with the child. The trial court interposed its own objection to this testimony, on the ground that it was not relevant to whether the father had tried to contact the child.

This was error (though not reversible error, because the mother has not raised it on appeal). The evidence was relevant to whether the father, *when* he failed to communicate with the child, did so *with the intent to abandon*. The fact that he was given a car for this purpose, yet still failed to communicate, tends to show intent to abandon.

financial support." She instructed the Department of Child Support Services to stop collecting support from the father.

In December 2015, the father filed a paternity petition. In it, he requested custody and visitation. In a supporting declaration, he stated, "At present, the [mother] keeps our son away from me. I have tried many times to resolve issue [*sic*] between [the mother] and I [*sic*] but nothing seems to work." Similarly, in his response to the probation officer, he said he had sent the child cards and gifts, but the mother would not let him see the child. The mother testified that these statements by the father were untrue.

Later in December 2015, the mother and the stepfather got married. The child called the stepfather "Dad." He did not recognize the father as his father.

II

PROCEDURAL BACKGROUND

On January 20, 2016, the stepfather filed a petition to adopt the child. On January 29, 2016, the mother and the stepfather[3] filed a petition to free the child from the father's custody and control. On February 2, 2016, the petition was served on the father.

The probation officer interviewed the parents. He also sent a questionnaire to the father by certified mail, "request[ing] an urgent response." The father received the questionnaire on February 20 or 21. As of February 29, he had not yet responded.

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[3] As we will discuss in more detail in part III, *post*, it is not at all clear exactly who filed the petition. However, we will conclude that it was both the mother and the stepfather.

The probation officer filed a report recommending that the trial court grant the petition based on failure to communicate. The trial court, however, ordered the probation officer to send another questionnaire.

On April 5, 2016, the probation officer sent another questionnaire to the father by certified mail, once again "request[ing] an urgent response." On April 18, he received the father's response. In it, the father said the mother would not let him see the child. The probation officer, however, continued to recommend that the trial court grant the petition based on failure to communicate.

The father appeared at the next scheduled hearing, and the trial court appointed counsel for him. In July 2016, he filed an objection to the adoption petition.

After a trial, at which the mother was the only witness, the trial court denied the petition. It laid out its reasoning in several steps.

Initially, it observed that the statutory scheme set out "a two-part test" — first, had there been a lack of support or a lack of communication; and second, "[W]hat's the intent on the part of the parent . . . ? Why was there not support? Or why was there no communication?"

Next, it found that the father's filing of a paternity petition showed that he did not have the intent to abandon. "He's filed to protect his legal interest. . . . [F]rom his filing, he's saying he wants to see the child. So it's going to go through the process." It observed that the "timeline" was "interesting": "[I]t would have been maybe a different call if he did it reactionary. There's a filing of termination of his rights, he's like, 'Oh,

my God, I better show the Court that I really want to see the child. Let me file something real quick.' That's not how it worked. He did it before this was filed."

It declined to find a failure to support, because the father had made two voluntary support payments, and also because the mother had affirmatively asked him to stop paying.

The parents' counsel then argued that, when the father filed his paternity petition, there had already been a failure to communicate for over one year, since July 2014.

In response, the trial court noted that, in the father's declaration in support of his paternity petition, he had stated that the mother was keeping the child away from him. "So I don't know what period of time he's talking about. He could be talking about back to 2014. He could be talking about back to the date when the child was born. I don't know. But I'm not the Family Law Court that's going to make that determination. But I got to arguably take him at his word and let the Family Law Court examine that further."

" . . . I don't know if she's kept him away from the child or not. I don't know. But taking his declaration filed under penalty of perjury, . . . perjury is a felony, you know. If he's lied, then there will be repercussions down the line. But I don't know what period of time."

"You could have put him on the stand and tested his veracity to tell the truth. . . . 'What do you mean she's kept our son away from me?' 'When did she do that?' 'Tell me when.' And I could have looked at his credibility to see if I think he's telling the truth."

It concluded: "I don't even understand being really so upset about it. At some point in time, you guys got along to make a child. And you have a man here saying that, 'I want to be involved in it.' And that doesn't take away anything from your husband that will have the child in the home and could be a great dad for the child. . . .

" . . . [I]f he's a drunk and a druggie, . . . that will come out in Family Law, then he probably wouldn't get any time with the child. But again, we're not here for that. . . .

" . . . [H]e wants to see the child, and . . . he was paying for the child. Most of these cases, these guys don't pay anything at all. . . . Just have children anywhere and don't want to pay nothing and don't want to see the child. So we don't have that here so the Court has made its ruling."

The mother and the stepfather filed a timely notice of appeal.

III

THE PARTIES

Preliminarily, we need to clarify exactly who the parties are.

The petition, as originally typed, was in the names of both the mother and the stepfather. Both of them signed it. However, the clerk refused to accept it for filing, stating, "Caption is incorrect, petitioner is [the stepfather]." (Capitalization altered.) Somebody crossed out the mother's name, by hand, in the caption and in the text of the petition; then the clerk accepted it. Thus, in the register of actions and in all of the minutes, the stepfather is listed as the sole petitioner.

Both the mother and the stepfather, however, attended every hearing. Their attorney consistently announced that she was appearing for both of them. And, as mentioned, both the mother and the stepfather filed a notice of appeal.

The clerk may have reasoned that the stepfather had brought the adoption petition, and therefore he was the only person who could bring the petition for freedom from custody and control. If so, however, that was incorrect. A petition for freedom from custody and control can be brought even if there is no pending adoption petition. (*T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1438-1439.) Moreover, it can be brought by any "interested person." (Fam. Code, § 7841, subd. (b).) The mother was an interested person within the meaning of the statute. (*T.P. v. T.W.*, *supra*, 191 Cal.App.4th at pp. 1436-1440.)

We conclude that the mother intended to be a party to the proceeding all along, and that the hand-written alterations to the petition were unauthorized and a mere clerical error. Accordingly, the mother is also a proper party to this appeal.

IV

THE TRIAL COURT'S RULINGS

A. *Statutory Background*.

Under Family Code section 7822, a court may order a child freed from a parent's custody and control under certain specified circumstances. One such circumstance is that "[o]ne parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from

the parent, with the intent on the part of the parent to abandon the child." (Fam. Code, § 7822, subd. (a)(3).) Mere "token efforts to support or communicate with the child" do not preclude a finding of abandonment. (Fam. Code, § 7822, subd. (b).)

"The . . . failure to provide support[] or failure to communicate is presumptive evidence of the intent to abandon." (Fam. Code, § 7822, subd. (b).) "The parent need not intend to abandon the child permanently; it is sufficient the parent had the intent to abandon the child during the statutory period. [Citation.]" (*In re E.M.* (2014) 228 Cal.App.4th 828, 839.)

"A declaration of freedom from parental custody and control . . . terminates all parental rights and responsibilities with regard to the child." (Fam. Code, § 7803.)

B. *Considering Only the One Year Preceding the Petition.*

The parents contend that the trial court erred by limiting its consideration to the one-year period immediately preceding the filing of the petition.

1. *Additional Factual and Procedural Background.*

The petition alleged that the father had abandoned the child since July 2014, the date of his breakup with the mother.

While the mother was testifying about events in 2014, the trial court commented, "[W]hat's the relevance of this? I mean we're going back to almost three years now. . . . I'm more concerned with the last contact in January of 2015." "[T]he code . . . talks about abandonment for one year . . . . It doesn't say for three years."

The parents' counsel argued that the statute did not require the one-year period of abandonment to immediately precede the petition. She explained that, just in case the trial court might find that the father's paternity petition in December 2015 terminated any period of abandonment, she wanted to prove that the abandonment actually started in July 2014.

The trial court asked, "So hypothetically, if a child was born in 2007 and a father was absent the first year from 2007 to 2008, but then was active from 2008 to the present, is it your position . . . that the Court could rely on that first year . . . .?" The parents' counsel once again asserted that "the one-year period need not immediately precede the filing of the petition," citing *In re A.B.* (2016) 2 Cal.App.5th 912. The trial court said, "Okay. All right. You can continue with your direct examination." Otherwise, it did not rule on what the relevant time period was.

At the end of the trial, the trial court did, in fact, find that the paternity petition demonstrated lack of intent to abandon. The parents' counsel argued once again that there had already been a one-year period of abandonment even before the paternity petition was filed. She offered to give the trial court a copy of *In re A.B.*

The trial court responded, "[E]ven taking the case into consideration, . . . even taking it at what you say it says," the father had stated in the paternity petition that the mother was keeping the child away from him, and he had not specified a time period. "[H]e could be talking back to 2014, 2013. I don't know what period of time."

2. *Discussion*.

The parents state that the trial court "limited the evidence of the alleged abandonment to the period between January 2015 and January 2016, the one year period immediately preceding the filing of [the stepfather's] petition."

They are correct that the one-year statutory period is not limited to the year immediately preceding the filing of the petition. (*In re A.B.*, *supra*, 2 Cal.App.5th at pp. 919-922.) Any other interpretation "would allow a parent to abandon a child for many years, only to race to the courthouse to obtain visitation as soon as a new stepparent enters the picture, thereby precluding the court from terminating the abandoning parent's rights and interfering with the child's potential adoption, stability and security." (*Id*. at p. 922.)

However, we find no such ruling. The trial court raised a relevance objection on its own motion, but it allowed the parents' counsel to respond. Admittedly, it asked a hypothetical question that implied some skepticism about counsel's position; however, after counsel responded, all it said was, "Okay." It never precluded her from introducing any evidence.

In addition, at the end of the trial, it expressly *accepted* (at least for the sake of argument) that the one-year period of abandonment did not have to immediately precede the petition. Nevertheless, it reasoned that, given the father's failure to specify when the mother kept the child away from him, it could not find the intent to abandon for any one-year period.

To summarize, then, "[n]o ruling was made below. Accordingly, no review can be conducted here. '[T]he absence of an adverse ruling precludes any appellate challenge.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

C. *Requiring Proof of Both Failure to Support and Failure to Communicate*.

The parents contend that the trial court erred by requiring proof of both failure to support and failure to communicate.

1. *Additional Factual and Procedural Background*.

While the mother was on the stand, there was this exchange:

"[PARENTS' COUNSEL]: Since we're proceeding under the communication, I was going to go through some child support issues, but . . . does the Court not want me to touch on the child support paid since we're proceeding under 7822 under the contact provision?

"THE COURT: What do you mean 'the contact provision'?

"[PARENTS' COUNSEL]: Just part of the statute regarding no communication for a year, not no support.

"THE COURT: My understanding is both. It's not just one.

"[PARENTS' COUNSEL]: It's or. So we're proceeding under the no communication portion of that statute.

"THE COURT: [T]he statute says 'or', you know, without provisions for support or without communication from the parent. The statute doesn't say 'and,' so I interpret it to mean that either he didn't do either one of them 'or' when it says 'or.' . . .

"Counsel, are you stating that you're trying to isolate the provision to say to ignore whether or not he paid support during that time period, but just during the communication portion of it?

"[PARENTS' COUNSEL]: Yes, your Honor. In every other case that I've proceeded under 7822, it's been either/or, that we do not have to prove to show the intent to abandon, that it was an 'and.' If there is no contact for one year, and the child has been left in the care of the other parent, that the presumptive intent is to abandon. That it does not need to be that the parent . . . has left the child with no contact for one year and support. So it's my understanding that . . . a finding can be made under one or the other. And we're proceeding under no contact for the one-year period."

The trial court did not make any ruling; rather, it said, "I'll continue to listen and let you guys put on your case."

At the end of the trial, the trial court said, "I know what the code says. . . . I break it down into parts, and I believe that part of it is the part that talks about 'With[out] provisions for the child['s] support or without communication from the parent.' And then the next part, because there's a comma there, 'with the intent on the part of the parent to abandon the child.' So I look at it as a two-part test. So if, for example, the Court does find that . . . there has been no provision for support or there's been no — without communication from the parent, okay, that's one element that is met.

"Then I go to the next element of what's the intent on the part of the parent . . . ? Why was there no support? Or why was there no communication? Because a lot of the

times in these cases it's clear that there was no communication or no support." It then found that the father had no intent to abandon.

2. *Discussion.*

The plain meaning of Family Code section 7822, subdivision (a)(3) is clear: The petitioner must prove *either* failure to support *or* failure to communicate. (*Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467 ["Financial inability may excuse the failure to send any funds for support of the children [citation], but the failure to communicate for the requisite statutory period of time is adequate ground under the statute to adjudicate an abandonment by the non-communicating parent."].)

Once again, however (see part IV.B, *ante*), the trial court never made a ruling to the contrary.

The midtrial discussion between the court and counsel was cryptic, at best. For example, we can only guess what the trial court meant when it said, "I interpret it to mean that either he didn't do either one of them 'or' when it says 'or.'" The parents' counsel further confused matters by throwing in the concept of intent to abandon, which was not germane.

Arguably, the trial court's question, "[A]re you . . . trying to isolate the provision to say to ignore whether or not he paid support during that time period . . . ?" *implied* that the parents had to prove both failure to support and failure to communicate. Still, it was only a question, not a ruling. The trial court's only ruling at that point was, "I'll continue to listen and let you guys put on your case."

By contrast, the trial court's comments at the end of the trial clearly show that — at least by then — it was applying the legally correct standard. It noted that there was a two-part test; the first part was whether there was *either* a failure to support *or* a failure to communicate, and the second part was whether there was an intent to abandon. Thus, even assuming the trial court experienced some temporary confusion, the parents cannot show that that confusion affected the judgment.

Separately and alternatively, we also note that the asserted error was plainly harmless. The trial court did not deny the petition because the parents had failed to prove both failure to support and failure to communicate. Rather, it denied the petition because it found no intent to abandon. Thus, even if it had found a failure to communicate alone (or a failure to support alone), it would still have denied the petition.

The denial of the petition therefore stands or falls on whether the trial court properly found lack of intent to abandon. We turn to this question now.

D. *Finding of Lack of Intent to Abandon*.

The parents contend that the trial court erred by finding that the father did not have the intent to abandon.

"When a finding of fact is attacked on the grounds that it is not supported by substantial evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding. [Citation.] All evidence most favorable to the respondent[] must be accepted as true and that which is unfavorable discarded as

not having sufficient verity to be accepted by the trier of fact. [Citation.]" (*In re Baby Boy S.* (1987) 194 Cal.App.3d 925, 931.)

"[I]n applying this standard, we do not pass on the credibility of witnesses, resolve conflicts in the evidence, or determine the weight of the evidence. [Citation.]" (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 503.) "'"[A]ll conflicts in the evidence must be resolved in favor of the respondent[] and all legitimate and reasonable inferences must be indulged in to uphold the judgment."' [Citation.]" (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010-1011.)

The parents had the burden of proving the intent to abandon. (Fam. Code, § 7822, subd. (a)(3).) However, they rely on the statutory presumption: "The . . . failure to provide support[] or failure to communicate is presumptive evidence of the intent to abandon." (Fam. Code, § 7822, subd. (b).) This presumption shifts the burden of producing evidence. (*In re Rose G.* (1976) 57 Cal.App.3d 406, 419-420.) This means that, if there is substantial evidence of lack of intent to abandon, "the presumption disappear[s] . . . and the trial court [i]s required to determine the existence or nonexistence of the [intent to abandon] (1) without regard to the presumption; (2) with no change in the allocation of the burden of proof with respect to the [intent to abandon]; and (3) by weighing the evidence as to the existence of the basic facts of the presumption and any appropriate inferences arising from these facts against the evidence as to the nonexistence of the [intent to abandon], and resolv[ing] the conflict. [Citations.]" (*Id.* at p. 424.)

There was uncontradicted evidence of lack of communication for over one year — from the last visit on January 18, 2015 through the filing of the petition on January 29, 2016. Admittedly, this period was interrupted by the father's filing of his paternity petition on December 1, 2015. However, while there was evidence of three contacts in September 2014, in October 2014, and on January 18, 2015, these were token efforts as a matter of law. Thus, the lack of communication actually started with the breakup in July 2014.

As the parents note, the father did not testify. However, he did introduce several exhibits, including his paternity petition. The trial court expressly relied on the paternity petition in finding lack of intent to abandon. We cannot agree, however, with the trial court's reasoning.

The trial court stated that the very filing of a paternity petition was evidence of lack of intent to abandon. It added that the "timeline" was significant — if the stepfather had filed his adoption petition first, "it would have been maybe a different call" because, in that event, the paternity petition would be merely "reactionary."

This overlooks, however, the uncontradicted evidence that, in August 2015, the mother asked the father to consent to an adoption by the stepfather. The father responded by "threaten[ing] to take her to court." At oral argument, the father's counsel even conceded that, after the mother asked him to consent to adoption, the father filed the paternity petition "because he can see where this is going." "When a reviewing court applies the substantial evidence standard, it must review the whole record to determine

whether it supports the judgment. [Citation.] It may not confine its consideration to isolated bits of evidence. [Citation.]" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 840.) Here, in light of the whole record, even under the trial court's own reasoning, the paternity petition was "reactionary," and thus it was not evidence of lack of intent to abandon.

In any event, as the parents' counsel argued below, because the failure to communicate started in July 2014, the one-year statutory period had already run before the father filed his paternity petition. According to the trial court, the father's statement in his declaration[4] that the mother was keeping the child away from him also showed lack of intent to abandon; moreover, because it was vague as to time, "[h]e could be talking about back to 2014." It must be remembered, however, that under the presumption, the father had the burden of producing evidence of lack of intent to abandon. In his declaration, he merely stated, "*At present*, the [mother] *keeps* our son away from me." (Italics added.) Admittedly, he implied that this problem was not entirely brand-new, by adding, "I have tried many times to resolve issue [*sic*] between [the mother] and I [*sic*]

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[4] The father's declaration was inadmissible hearsay. However, the parents forfeited this objection by failing to raise it below. (Evid. Code, § 353, subd. (a).)

The father's declaration also was not properly executed under penalty of perjury. It did state, "I declare under penalty of perjury that the foregoing is true and correct." However, it did not state that it was executed in California (see Code Civ. Proc., § 2015.5, subd. (a)), and it did not refer to "the penalty of perjury under the laws of the State of California." (See *id.*, subd. (b).) Accordingly, even if it was false, the father could not have been prosecuted for perjury. Once again, however, the parents forfeited this objection by failing to raise it below.

but nothing seems to work." However, this was hardly substantial evidence that the mother was *already* keeping the child away from him *before* the one-year statutory period ran. (See *Atiya v. Di Bartolo* (1976) 63 Cal.App.3d 121, 126 ["[A]ffidavits or declarations setting forth only conclusions, opinions or ultimate facts are to be held insufficient."].)

At oral argument, the father's counsel asserted that the father decided not to testify because he relied on the trial court's erroneous view that the burden never shifted to him. In her view, he did not have a full and fair opportunity to make his case; she therefore urged us to remand for a retrial. The record, however, does not support this argument. At least until the father chose not to testify, the trial court never expressed the opinion that he had no burden of proof. Quite the contrary — at one point, it told the parents' counsel, "[Y]ou put on your case regarding the communication . . . and . . . then I think the burden shifts to the respondent . . . . He's the one that has to show his intent . . . ." He made a knowing decision not to testify. Thus, we see no point to giving him a do-over.

It is also problematic that the trial court abdicated its responsibility to resolve conflicts in the evidence. As it noted, the mother flatly contradicted the father's claim that she had prevented him from seeing the child. However, it refused to decide the factual question that this contradiction posed. It stated, "I don't know if she's kept him away from the child or not. I don't know." "I'm not the Family Law Court that's going to make that determination. . . . *I got to arguably take him at his word* and let the Family

Law Court examine that further." (Italics added.) "If he's lied, then there will be repercussions down the line."[5] Thus, it seems to have used an erroneous summary-judgment-like standard — it denied the petition because it found a triable issue of fact as to intent to abandon (even though, as we have already held, the father's declaration was insufficient to raise this issue).

Once a petition to free a child from parental custody and control is filed, it automatically stays any pending paternity proceeding regarding the same child. (Fam. Code, § 7807, subd. (b).) "The petition . . . is the only matter that may be heard during the stay until the court issues a final ruling on the petition." (*Ibid*.) This shows a legislative preference for terminating a parent's rights once abandonment has been shown, *even if* the parent has already filed a paternity proceeding. Accordingly, as already mentioned, *In re A.B.* rejected a statutory interpretation that "would allow a parent to abandon a child for many years, only to race to the courthouse to obtain visitation as soon as a new stepparent enters the picture . . . ." (*In re A.B.*, *supra*, 2 Cal.App.5th at p. 922.)

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[5] It also criticized the parents' counsel for failing to call the father to testify. However, because the presumption of intent to abandon shifted the burden of producing evidence to the father, and because the father's declaration was fatally vague, this was a reasonable strategic decision. Indeed, counsel could reasonably expect the trial court to hold the father's failure to testify against him. (Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].)

The trial court effectively turned this legislative preference on its head. It reasoned that the mere filing of a paternity proceeding is sufficient to demonstrate lack of intent to abandon, and thus to require the denial of a petition for freedom from custody and control. Moreover, it reasoned that the mere statement, in that paternity proceeding, that the other parent was interfering with visitation barred it from even considering contrary evidence — at that point, the fact of abandonment could be decided only in the paternity proceeding.

We therefore conclude that, on this record, the parents made a prima facie case of abandonment from July 2014 on, thus shifting the burden of producing evidence to the father; the father failed to introduce sufficient evidence that he lacked the intent to abandon before the one-year period ran. Hence, the parents were entitled to have their petition granted.

V

DISPOSITION

The judgment is reversed. The matter is remanded with directions to grant the petition for freedom from custody and control.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

I concur:

McKINSTER
J.

Adoption of C.M., a Minor, E067084

MILLER, J., Dissenting

Rather than reverse the decision of the trial court, I would remand to the trial court as follows: (1) have the trial court determine whether defendant and respondent J.M. (father) failed to communicate or provide support to C.M. (child) during a one-year time period; and (2) if the trial court determines father failed to communicate with child during a one-year period, allow father an opportunity to rebut the presumption with the admission of evidence as to whether plaintiff and appellant M.F. (mother) prevented him from seeing child.

The holding by the majority is as follows: "We . . . conclude that, on this record, [mother and A.F.; collectively, parents] made a prima facie case of abandonment from July 2014 on, thus shifting the burden of producing evidence to the father; the father failed to introduce sufficient evidence that he lacked the intent to abandon before the one-year period ran. Hence, the parents were entitled to have their petition granted."

Initially, the trial court never made a ruling as to whether there was a lack of communication or support for a period of one year. I disagree that this court can, for the first time on appeal, determine that there was no communication between father and child from July 2014 through July 2015. The trial court never made a ruling whether there was a failure to communicate or failure to pay child support by father, thereby shifting the burden to father to produce evidence that it was not his intent to abandon child. The trial court discussed Family Code section 7822. It stated, "So I break it down into parts, and I believe that part of it is the part that talks about 'With all provisions for the child support

or without communication from the parent.' And then the next part, because there's a comma there, 'with the intent on the part of the parent to abandon the child.' So I look at it as a two-part test. So if, *for example*, the Court does find that for a period of one year there has been no provision for support or there's been no—without communication from the parent, okay, that's one element that is met. [¶] Then I go to the next element of what's the intent on the part of the parent, why is that?" (Italics added.)

The trial court then looked to the lack of foundation presented by parents that father was on social media. Further, the trial court addressed whether father showed he wanted to communicate with child by filing the paternity petition in December 2015. At no time did the trial court rule that there was a one-year period during which father failed to communicate or provide support to child.

It is true that the trial court labored under the misconception that the one-year period had to be during the year preceding the petition. (See *In re A.B.* (2016) 2 Cal.App.5th 912, 919 ["[T]he Legislature did not intend to limit the one-year period in [Family Code] section 7822, subdivision (a)(3), to the one year immediately preceding the filing of the petition"].) Parents were entitled to argue that the one-year time period was between July 2014 and July 2015. Regardless, the trial court never reached a decision whether there was no communication between child and father during any one-year time period.

The majority holding is based on its conclusion that the one-year period began in July 2014 and that the three visits in September 2014, October 2014, and January 18, 2015, were token visits as "a matter of law." Not only does the majority determine the

applicable one-year time period, it makes the factual decision that these three communications were not sufficient. In addition, this presumes that mother did not keep child from father during that period. In father's paternity petition, he claimed "At present, [mother] keeps our son away from me. *I have tried many times to resolve issue* between [mother] and I but nothing seems to work." (*Sic*.) (Italics added.) As such, there was a conflict of evidence between father and mother during the time period of July 2014 through 2015.

"'The questions of abandonment and of intent . . . , including the issue of whether the statutory presumption has been overcome satisfactorily, are questions of fact for the resolution of the trial court.'" (*In re A.B., supra,* 2 Cal.App.5th at p. 922; see also *In re Brittany H.* (1988) 198 Cal.App.3d 533, 550) Here, the majority makes the factual findings on appeal that (1) the relevant time period started in July 2014; (2) the three contacts did not support there was communication; and (3) that father's claim that mother was keeping father from child occurred after the one-year statutory period had run. These questions must be answered by the trial court.

Upon remand, if the trial court concludes there was a one-year period of time that father failed to communicate with child, I would allow father to present evidence to rebut the presumption he intended to abandon child. "The . . . failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon." (Fam. Code, § 7822, subd. (b).) I believe father was not given proper notice that he had to present evidence to show he did not intend to abandon child starting in July 2014.

Clarification of the record before this court is required. While I substantially agree with the recitation of facts set forth by the majority, there is an exception. The majority opinion states that the petition for freedom from parental custody and control (petition) pleaded abandonment since July 2014; however, the petition was not entirely clear. On the first page of the petition, it was alleged that child was left in the care of parents "without any provision for support *or* without communication from said parent(s), with the intent on the part of said parent(s) to abandon said person(s) continuously since January 18, 2015 to the time of filing this petition." On the second page it was alleged, "The child has been willfully left by Father, [] with the intent to abandon, in the sole care and custody of Mother, [] without communication, other than token efforts, since July 7, 2014, the last token contact on January 18, 2015." The probation report stated that the last contact of any kind between child and father was on January 18, 2015.

Further, once the hearing commenced and parents sought to admit testimony regarding the time period beginning in July 2014, including that there were only short visits between father and child in September 2014, October 2014, and January 18, 2015, the trial court noted that evidence was not relevant. The trial court advised counsel to only address the relevant one-year period prior to the filing of the petition. Mother then testified about the brief contacts in September 2014 and October 2014. Again the trial court noted that the evidence was not relevant to the proceeding because the statute required that the one-year period be prior to the filing of the petition. Parents' counsel tried to advise the trial court of the law. The trial court made no ruling but advised parents to continue to present evidence.

On cross-examination of mother, father's counsel restricted the questions on communication from January 2015 through January 2016. After mother's testimony, parents sought to introduced the testimonies of the maternal grandmother and maternal great-grandmother. The offer of proof of for their testimony was as follows: "[D]uring the time period that we're referring to would be January 18, 2015 that [father] did not come to their home asking to see [child], send them anything in the mail or to their home to be given to [child], no telephone calls to try to reach [mother] for [child], or anything of that nature. Just to show that time period."

Finally, during argument, parents' counsel asked the trial court, since it was relying heavily on the filing of the paternity petition in December 2015, whether it would consider another one-year period, e.g. beginning in July 2014. The trial court noted, "But even taking the case in consideration, even though it wasn't briefed and filed properly for the Court to consider before the Court takes the bench, ..."

Based on the foregoing, father was never given proper notice that he had to present evidence beginning in July 2014. Father cannot be faulted for failing to present evidence or testify about abandonment starting in July 2014 as the petition itself was ambiguous and the trial court focused on the period after January 2015. Upon remand, if the trial court determines that the appropriate time period began in July 2014, father should be afforded the opportunity to present evidence to rebut the presumption.

MILLER

J.